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No. 82-660

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

HARRISON P. CRONIC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent concedes that this case ordinarily would not require more than 25 days to prepare for trial and that the Constitution did not require the district court to appoint counsel who had more experience in criminal cases than did Chris Colston, his attorney. He nevertheless asserts, somewhat inconsistently, that the court of appeals correctly reversed his conviction without identifying any deficiencies in counsel's actual performance because the district court made adequate representation "impossible" by allowing Colston "only" 25 days to prepare for trial. There is, however, no basis for concluding that it was "impossible" for Colston to prepare this straightforward check-kiting case in the 25 days allowed.

Perhaps recognizing the flaws in the court of appeals' approach, respondent devotes the major portion of his brief (Resp. Br. 35-62) to an alternative argument: that

the court of appeals could have found a Sixth Amendment violation based on what respondent asserts were deficiencies in counsel's actual performance. But the court of appeals did not decide the case on that ground, and the district court likewise did not address these issues. Accordingly, this Court would not normally pass on respondent's complaints about his attorney in the first instance. Nor is there any reason to remand the case for that purpose.

Respondent has combed the record in search of ways in which to second-guess counsel's trial strategy, to imply that counsel was negligent and failed to investigate, and to create the impression that counsel did not understand governing legal principles. These contentions are entirely unsubstantiated on the present record, and the particular defenses respondent now suggests that counsel should have pursued are without basis in fact or law. The evidence at trial established that respondent was caught red-handed in a classic check-kiting scheme of the kind that long has been held to violate 18 U.S.C. 1341. Respondent's attempt to attack his conviction by attacking his attorney in these circumstances underscores the need for the Court to articulate a test for ineffective assistance of counsel that requires a threshold showing of a substantial defect in the proceedings, instead of focusing on the performance of the attorney in the abstract. The convicted defendant should be required to show that counsel's performance fell materially below the minimum acceptable level of competence and in turn had a probable effect on the outcome of the case or undermined the fundamental fairness of the proceedings.

1. Respondent first contends (Resp. Br. 24-35) that the court of appeals correctly reversed his conviction on the ground that inadequate representation could be "inferred" in this case without the need to "show specified errors in the conduct of his defense" (Pet. App. 3a-4a). In respondent's view, this case involves the kind of external restraint on counsel's performance for which au-

tomatic reversal is required,[1] because the trial court made adequate preparation "impossible" by granting Colston, who did not have prior experience in criminal trials, "only" 25 days to prepare (Resp. Br. 28). This reasoning is seriously flawed.

a. As an initial matter, respondent's contention is substantially undermined by his repeated concession (Resp. Br. 31, 33, 44-45, 47) that he had no constitutional right to have the court appoint a lawyer who had more experience in criminal cases than did Colston. This concession is sound. As we have explained in our opening brief (Gov't Br. 39-41), "in determining whether there has been effective assistance, the primary focus must be on how well counsel performed in the particular case, not on how much experience counsel has had. * * * Counsel may sometimes compensate for their lack of experience by unusual zeal and industry." *Harris* v. *Housewright*, 697 F.2d 202, 205 (8th Cir. 1982) (footnote omitted).

There is, moreover, no reason to believe that the Framers of the Sixth Amendment intended the term "Counsel" to mean something more than a member of the bar admitted to practice before the court. The Judiciary Act of 1789, ch. 20, 1 Stat. 73 *et seq.*, which was signed one day before the Sixth Amendment was proposed (*Faretta* v. *California*, 422 U.S. 806, 831 (1975)), reflects this understanding. Section 35 of that Act provided that "in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein." 1 Stat. 92; 28 U.S.C. 1654. These standards were met in this case. It is undisputed that Colston was a member of the Bar of

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[1] See Resp. Br. 30-32, citing *Holloway* v. *Arkansas*, 435 U.S. 475 (1978); *Geders* v. *United States*, 425 U.S. 80 (1976); *Herring* v. *New York*, 422 U.S. 853 (1975); and *Brooks* v. *Tennessee*, 406 U.S. 605 (1972).

Oklahoma [2] admitted to practice before the district court and that he was selected to represent respondent in accordance with the district court's plan under the Criminal Justice Act (CJA) (J.A. 38). 18 U.S.C. 3006A(a).

Unlike respondent, amici do contend that "[s]omething more than a license to practice [law] is necessary • • • where the client will probably be imprisoned" (NACDL Br. 22). But NACDL nowhere attempts to find support for this view in the text, history, or purposes of the Sixth Amendment. Nor does NACDL define what the "[s]omething more" it urges should consist of, and it states that this Court likewise need not fashion a "bright line" test (NACDL Br. 22). NACDL instead proposes that the trial court inquire on a case-by-case basis into the "skill, qualification, ability, training and experience" of counsel (NACDL Br. 23). This approach would impose a substantial burden on trial courts, which now may rely on readily ascertainable eligibility criteria that reflect the expert judgment of the responsible licensing authority or other body regarding the minimum qualifications necessary to appear in the case, including any special certification of competence in trial advocacy or criminal defense.

Indeed, whether counsel in criminal prosecutions should possess qualifications in addition to admission to the bar and the details and manner of implementation of any such requirement are matters uniquely appropriate for resolution through legislation, the promulgation of court rules, revision of CJA plans and parallel state programs, and initiatives by the bar and law schools. See Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 Fordham L. Rev. 1 (1980).[3] The bare

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[2] According to the 1983 edition of the *Martindale Hubbel Law Directory* (at 617B), Colston was admitted to the Oklahoma Bar in 1975, five years before the trial in this case.

[3] Contrary to respondent's assertion, we do not suggest in our opening brief (Gov't Br. 19-20) that "constitutional concepts should

terms of the Sixth Amendment furnish no guidance on these issues. The adoption by this Court of rigid requirements directly under the Sixth Amendment also would intrude upon the traditional prerogative of the states to regulate the practice of law and would stifle the very type of experimentation in improving the quality of representation that NACDL and others urge. NACDL Br. 22-24; NLADA Br. 52-53; Resp. Br. 47.

b. Respondent also expressly concedes that the trial court "was under no necessary obligation, under the Constitution, to allow more than twenty-five days to prepare" for trial in this case (Resp. Br. 33; see also *id.* at 28). But he nevertheless contends (Resp. Br. 28-30) that the trial court made adequate preparation "impossible" within that time because it appointed an attorney who did not have prior criminal trial experience. This contention is without merit. There is no basis in the present record or in common sense for concluding that Colston was effectively *precluded* from preparing for trial in the time that respondent concedes would ordinarily be constitutionally adequate. To the contrary, the indications are that Colston performed conscientiously and thoroughly in the face of a compelling case against his client. The

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play no part in remedying incompetence" (see Resp. Br. 39). We agree that the Sixth Amendment may furnish a basis for relief in an appropriate case if the attorney's performance departed significantly from the range of competence reasonably expected of defense counsel, to the substantial detriment of the accused. The point in our opening brief is simply that Sixth Amendment analysis should focus on the effect of counsel's actions on the rights of the accused in the particular case, and should not be employed by a court sitting to review a final judgment of conviction as a means to accomplish broader ends beyond the case before it—*e.g.*, to improve the quality of the defense bar generally. That is more properly the role of those who are charged with addressing the problems of the legal profession from a broader perspective. Reversal of a conviction in an individual case would in any event be a most attenuated and inefficient way to attempt to solve the systemic and elusive problem of attorney competence generally.

timing of Colston's appointment therefore was simply not the sort of external impediment from which it must be conclusively presumed that the accused received ineffective assistance, without regard to counsel's actual performance. Compare *Powell* v. *Alabama*, 287 U.S. 45, 71 (1932) (effective assistance "preclude[d]" by designation of responsible counsel on day of trial).[4]

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[4] This case does not remotely resemble the decisions of other courts of appeals that respondent contends (Resp. Br. 29 & n.15) are "plainly in line" with the decision below. See *Rastrom* v. *Robbins*, 440 F.2d 1251, 1255 (1st Cir.), cert. denied, 404 U.S. 863 (1971) (inexperienced counsel was given four hours to prepare for trial; counsel declared he was not prepared; defendant was mentally unstable); *United States* v. *Knight*, 443 F.2d 174, 177 (6th Cir. 1971) (counsel allowed 30 minutes between appearance and trial and "was denied any opportunity whatsoever to interview witnesses or otherwise to investigate the case"); *United States ex rel. Williams* v. *Twomey*, 510 F.2d 634 (7th Cir.), cert. denied, 423 U.S. 876 (1975) (inexperienced counsel appointed on day of trial; no opportunity to interview or call co-defendant who would have given exculpatory testimony); *Wolfs* v. *Britton*, 509 F.2d 304 (8th Cir. 1975) (request for continuance denied even though counsel had only 1½ days to prepare, there were "inexplicable" circumstances in the offense and a possible psychiatric defense, and counsel was unable to contact out-of-state witnesses); *MacKenna* v. *Ellis*, 280 F.2d 592 (5th Cir. 1960), aff'd per curiam, 289 F.2d 928 (en banc), cert. denied, 368 U.S. 877 (1961) (inexperienced counsel who had a conflict of interest because of pending applications for employment with prosecutor did not adequately resist prosecutor's request to advance trial date, even though defendant objected and was unable to contact numerous alibi and character witnesses who later filed supporting affidavits); *Garland* v. *Cox*, 472 F.2d 875 (4th Cir. 1973) (counsel not appointed until day of trial and conferred with defendant for 15 or 20 minutes prior to trial).

In *Moore* v. *United States*, 432 F.2d 730, 735, 738-740 (3d Cir. 1970) (en banc), the court affirmatively rejected a presumption of ineffectiveness resulting from late appointment of counsel and remanded for consideration of specific deficiencies in counsel's performance. *Moore* obviously does not support the automatic reversal of respondent's conviction here without regard to counsel's performance. Similarly, in *Coles* v. *Peyton*, 389 F.2d 224 (4th Cir. 1968), cert. denied, 393 U.S. 849 (1968), the court identified specific and substantial errors in counsel's performance.

Furthermore, if, as respondent concedes, the court's designation of Colston satisfied the constitutional requirement that "Counsel" be appointed, the time that ordinarily would be sufficient for "Counsel" to prepare a case of this sort for trial cannot be conclusively presumed to be inadequate. At least that is so in this case, where the trial was not held only a day or two after counsel was appointed. Colston had ample time in 25 days to compensate for his lack of prior experience by, for example, seeking the advice of more experienced counsel if necessary. And the affidavit filed by the government in the court of appeals indicates that Colston in fact did receive the assistance of an experienced criminal lawyer, Ryland Rivas, in preparation of the case and at trial (Gov't Br. App. 1a).[5]

c. The other factors respondent cites (Resp. Br. 29) to support his claim that Colston had insufficient preparation time are insubstantial. First, the fact that respondent faced a maximum of 65 years' imprisonment on a 13-count indictment reveals nothing about the preparation time required. The 13 counts in the indictment were based on 13 similar transactions in one overall course of conduct. Second, the fact that the indictment was returned 4½ years after the crimes were committed is not a measure of the time defense counsel needed, especially since the government made the fruits of its investigation available to Colston (J.A. 35). Third, there is no indication that the fact that witnesses resided in four states had any adverse effect on counsel's preparation.

Finally, contrary to respondent's assertion (Resp. Br. 29), a mail fraud case is not inherently "complex and arcane." There are but two elements of the offense:

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[5] Respondent attempts to dismiss Rivas's role by asserting that "[t]he record establishes that if [Rivas] was present, it was as little more than a spectator" (Resp. Br. 17). The record establishes no such thing. It is true that Rivas did not actually conduct the defense at trial. But this does not undermine Rivas's averment that he assisted Colston prior to and during trial.

"(1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme." *Pereira* v. *United States*, 347 U.S. 1, 8 (1954). Here, the use of the mails was established by testimonial and documentary evidence (Gov't Br. 4), and indeed the delay in clearing checks occasioned by the use of the mails was responsible for the "float" that respondent concedes was created (see Resp. Br. 55, 60 n.50). See, *e.g.*, *United States* v. *Street*, 529 F.2d 226, 229-230 (6th Cir. 1976). Respondent does not suggest that Colston should have been able successfully to challenge the government's proof of this element of the offense, although he attempted to do so (Gov't Br. 5). The complexity of the second element—the existence of a scheme to defraud—depends on the nature of the particular scheme involved. Here, respondent was charged with check-kiting. This Court described that practice in simple terms in *Williams* v. *United States*, 458 U.S. 279, 281 & n.1 (1982), and the mechanics of such a scheme would not be difficult to grasp for anyone who maintains a checking account. There is, in short, no reason to believe that preparation of *this* mail fraud case was "impossible" within 25 days.[8]

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[8] Respondent asserts for the first time (Resp. Br. 64) that the scheduling of the trial violated his rights under the Speedy Trial Act, 18 U.S.C. 3161(c)(2), which provides that "the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se." See also NACDL Br. 37-43. Respondent did not raise this objection in either court below or present it in his Brief in Opposition as an alternative ground for affirmance of the judgment below. There accordingly is no reason for this Court to consider it.

In any event, this contention is without merit, as we explain in our opening brief. See Gov't Br. 37 n.26. Respondent's reliance (Resp. Br. 64) on *United States* v. *Daly*, 716 F.2d 1499 (9th Cir. 1983), is misplaced. The court in *Daly* explicitly held that "the 30-day period begins to run when an attorney appears on a defendant's behalf after the indictment or information has been filed" (716 F.2d at 1505), which attorney Levine did here more than four months prior to trial (J.A. 1). The court in *Daly* merely fashioned

d. Respondent also contends that "automatic reversal is appropriate" (Resp. Br. 31) because, in his view, when the district court was apprised of Colston's need for more time, it failed to inquire adequately into the matter or to take appropriate action. See Resp. Br. 31-33, 35. Contrary to respondent's assertion (Resp. Br. 4), however, the district court did not "preemptorily set the trial date" when Colston requested a continuance in order to prepare for trial. The court fully considered the argument by respondent, Colston, and Levine that additional preparation time was needed (J.A. 33-35), and it then *granted* the request for a continuance, "despite the fact the case ha[d] been delayed a great deal" (J.A. 35). The court simply decided to cut the continuance a "few days short" of the 30 days requested in order to fit the case into its schedule (J.A. 35). Neither respondent nor Colston objected to this accommodation, and neither thereafter requested a further continuance on the ground that the 25 days the court originally granted had proven to be insufficient. Nor has respondent even now shown how the difference between the 25 days granted and the 30 days requested was of constitutional dimension. He therefore plainly errs in characterizing the trial court's action as "outrageous" (Resp. Br. 28 n.13).[7]

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an exception for situations in which "there is an indication that the attorney is appearing only for a limited purpose and will not further represent that defendant at trial" (*ibid.*). In this case, there is no indication that Levine's representation was limited. We note as well that Colston actually was appointed to represent respondent on June 12, 1980 (J.A. 3, 24-27, 31), which also was more than 30 days before the July 14 trial date.

[7] This case also is quite different from *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), upon which respondent relies (Resp. Br. 31-32). There, the trial court did not take *any* action—to inquire adequately or to appoint separate counsel—when the attorney representing joint defendants stated that he had a conflict of interest. 435 U.S. at 478-481, 484. As a result, the conflict-of-interest defect was not remedied, and that defect infected the entire proceedings

2. Perhaps recognizing the flaws in the court of appeals' automatic reversal of his conviction without finding specific deficiencies in counsel's performance, respondent argues (Resp. Br. 35, 54-61) that the court of appeals *could have* found such deficiencies and granted relief on that ground. But of course it did not do so, and, as respondent apparently concedes (Resp. Br. 42), most of the alleged errors by counsel upon which respondent now relies were not even raised in the court of appeals. Moreover, because the claim of ineffective assistance of counsel was raised for the first time on appeal, the district court likewise has not made findings or developed a record on that claim.[8] This Court therefore cannot reasonably be expected to consider the scattershot attack respondent now makes on Colston's performance.

We nevertheless will address several of respondent's contentions so that this Court will not be left with the erroneous impression that there is substance to respondent's extravagant assertions that "[a]ctual, specific prej-

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by depriving the defendants of counsel who had undivided loyalty. *Id.* at 485-486, 489-490. Here, by contrast, the trial court did not ignore respondent's concerns, and there is every reason to believe that the continuance the court granted was sufficient to remedy the asserted inadequacy of preparation time.

[8] On March 11, 1981, more than six months after the judgment of conviction was entered, respondent filed a motion for a new trial on the basis of newly discovered evidence. Respondent included in that motion some allegations about counsel's experience and performance. See New Trial Motion at 21-28. These allegations would not appear to be cognizable in a motion for a new trial based on newly discovered evidence. In any event, because the district court denied the motion without reaching the merits (Gov't Br. 7 n.4), the government did not have an opportunity to present evidence in response to the allegations. As a result, although the court of appeals permitted respondent to include his new trial motions as a supplement to the record on appeal (J.A. 7), the material in that motion cannot furnish a basis for decision by this Court or by the court of appeals. Respondent's complaints about his attorney's performance instead should be raised, if at all, in a motion under 28 U.S.C. 2255. See note 17, *infra*.

udice appeared on almost every page of the record" (Resp. Br. 35) and that "gross" failures by counsel "leap from the record" (Resp. Br. 54). On the present record, respondent's speculation, nitpicking, and second-guessing of his attorney's performance serve only to illustrate the mischief that will result if this Court does not require a substantial threshold showing of a fundamental defect in the proceedings in order to obtain relief on a claim of ineffective assistance of counsel.

a. The first of the errors by counsel that respondent says "leap from the record" are that "[c]ounsel neither interviewed nor attempted to interview the prosecution's eighteen witnesses" and "failed to seek and obtain any prior statements of such witnesses made to the government" (Resp. Br. 54). Yet respondent does not cite *any* evidence—from the record or elsewhere—for these bald assertions. What is more, Colston's CJA reimbursement form, included as an appendix to NACDL's Brief, states that Colston devoted *45 hours* to "interviews and conferences." The CJA form does not identify who Colston interviewed or conferred with, but the amount of time devoted to these functions hardly suggests the neglect of the case respondent now seeks to portray. Colston's CJA form further indicates that he devoted 29.6 hours to "obtaining [and] reviewing records." The documents involved are not identified on the CJA form, but the record does establish that Colston was granted access to the Postal Service's extensive investigative file (J.A. 35).[9] We obviously do not ask this Court to resolve any factual issues regarding what Colston actually did to prepare for trial. But a court may not grant relief on the basis of

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[9] We have been informed by the Assistant United States Attorney responsible for the case that these materials contained statements made to investigators by government witnesses; that Colston examined those materials (see also Tr. 423); and that, during a discovery conference, Colston was informed of the details of the anticipated testimony of government witnesses.

an assumption or unsubstantiated assertion that counsel failed to perform certain functions, as respondent urges.

In addition, even if respondent were correct that Colston did not interview certain government witnesses or obtain their prior statements, this alone would not entitle him to relief. Respondent has not shown what information would have been obtained or how it would have been useful at trial. There also were alternative ways by which Colston could learn of the witnesses' anticipated testimony or other evidence. Respondent himself acknowledges that a "[f]ailure to make a thorough extrinsic investigation may be mitigated by the fact that substantial evidence has been obtained from the prosecutors and from the defendant" (Resp. Br. 49; see also *United States* v. *Decoster*, 624 F.2d 196, 209-210 (D.C. Cir.) (en banc) (plurality opinion), cert. denied, 444 U.S. 944 (1979)), and the scope of counsel's investigation also properly may be affected by the "strength of the government's case." *Washington* v. *Strickland*, 693 F.2d 1243, 1253 n.16 (5th Cir. 1982) (en banc), cert. granted, No. 82-1554 (June 6, 1983). See also *United States* v. *Katz*, 425 F.2d 928, 930 (2d Cir. 1970) (Friendly, J.). In these circumstances, the observations of Justice (then Judge) Stevens in response to similar claims are equally apt here:

> Appellants have alleged that their attorney interviewed them for less than an hour, * * * and that he did not produce any evidence or call any witnesses favorable to the defendants. But they have not alleged that any such evidence or witness existed, or was made known to their attorney, or could have been discovered by an investigation. Petitioners have not told us what was said in their conference with counsel. Perhaps, for all we know, they merely explained that they had indeed forged the 35 ballot applications which were placed in evidence by the government and that they were indeed guilty as charged. Surely, if that were the case, counsel had no duty to search for witnesses, expert or otherwise, who might falsely testify to the contrary.

Matthews v. *United States*, 518 F.2d 1245, 1246 (7th Cir. 1975).

Furthermore, even if respondent were able to show that Colston failed to investigate certain matters and that this failure caused his performance to fall below the range of competence expected of defense counsel, it still would be necessary for him to satisfy the second prong of the test for obtaining relief on the basis of ineffective assistance of counsel by showing that prejudice resulted from Colston's omissions. See Gov't Br. App. 7a-10a; U.S. Amicus Br. at 12-18, *Strickland* v. *Washington*, No. 82-1554. As we have explained in our amicus brief (at 18-26) in *Strickland*, this showing of prejudice must be at least equivalent to that required to obtain relief on the basis of the substantive defect in the trial that counsel is alleged to have caused. Where, as here, the asserted defect is that the judgment of conviction was based on less than all the relevant evidence, the defendant who alleges that his attorney caused this defect by failing adequately to investigate and present evidence at trial should be required to make the showing that is universally required in order to obtain a new trial on the basis of newly discovered evidence. Under that test, the defendant must show that the evidence, if available on retrial, probably would result in an acquittal. See also *United States* v. *Decoster*, 624 F.2d at 208 (plurality opinion) ("a likelihood that counsel's inadequacy affected the outcome of the trial").

The soundness of that approach is especially evident in this case. In district court, respondent filed a motion for a new trial based on newly discovered evidence, relying principally on evidence of the Norman bank's foreclosure of the mortgage on the bottling plant (see pages 18-19, *infra*) and that overdrafts represent a legitimate extension of credit. New Trial Motion at 2, 4-21. See note 8, *supra*. In his memorandum in support of that motion (at 3-4), respondent acknowledged that he had to demonstrate that this assertedly new evidence "probably would produce an acquittal." Although respondent argued (*id.* at 4-6) that the distinct "due diligence" element of

the newly discovered evidence test should be relaxed because Colston was incompetent in failing to develop this evidence, he did not argue that he should be excused from showing that the evidence probably would result in an acquittal on retrial. Now respondent has recast essentially the same argument as a claim of ineffective assistance of counsel and argues that a failure to develop a defense based on this evidence is a "substantial" defect that requires reversal *without regard* to the probable effect on the outcome of the trial or indeed without any showing of prejudice at all, except perhaps under a harmless error standard. See Resp. Br. 49. This vividly illustrates how, under the approach urged by respondent herein and the respondent in *Strickland* v. *Washington*, a substantive defect in the proceedings that would not warrant relief in its own right can readily be transformed into a ground for relief simply by claiming that counsel was ineffective in causing the defect.[10]

b. Respondent also plainly errs in contending that there was "manifest incompetence" (Resp. Br. 56) because "[c]ounsel should have proved that writing checks to obtain the benefit of the 'float' and to impress bankers with balances and activity is both common and legitimate" (Resp. Br. 55).[11] Respondent's activities do not at all

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[10] The respondent in *Strickland* v. *Washington* argues (Resp. Br. 62-67) that a test that focuses on the probable effect on the outcome would be inappropriate and speculative and require federal courts to retry questions of guilt and innocence and substitute their judgment for that of state courts and juries. These objections are insubstantial. For more than a century, courts considering motions for a new trial based on newly discovered evidence have assessed the probable impact of new evidence on the verdict. See also U.S. Amicus Br. 23-24. In addition, a federal court would not review such a claim on a petition for habeas corpus until the state court first had evaluated the claim. *Cf. Sumner* v. *Mata*, 455 U.S. 591 (1982). We also fail to see how the policy that federal courts on habeas corpus should respect determinations by state courts and juries would be furthered by a rule under which a state judgment must be set aside even if it is unlikely that counsel's error had any effect on the verdict or sentence.

[11] Respondent also makes much (Resp. Br. 4-5, 28 n.13, 55) of the fact that Colston indicated at the hearing on June 19, 1980

resemble the accepted banking and business practices to which he seeks to compare them.[12] Moreover, although this Court held in *Williams* v. *United States*, 458 U.S. 279 (1982), that check-kiting does not violate the particular federal statute there at issue (18 U.S.C. 1014), the Court plainly did not regard the practice as "legitimate." See 458 U.S. at 287. And, as Justice Marshall observed in dissent in *Williams*, "[t]he Courts of Appeals have been virtually unanimous in holding that check kiting is subject to federal prosecution under the mail and wire fraud statutes, and the majority [in *Williams*] apparently [did] not question these decisions." 458 U.S. at 305 (citations omitted). See, *e.g.*, *United States* v.

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that he would want the help of an accountant but then did not file a motion for that assistance. There is no indication, however, why an accountant's services were not sought. Perhaps Colston and Rivas determined that the assistance of an accountant was not required after all because the case did not prove to be as complex as it initially appeared or because the defense they decided to present—that the check-kiting scheme was the work of Cummings rather than respondent—might have made a detailed examination of that scheme unnecessary or even counterproductive at trial. In any event, respondent has not shown what evidence would have been developed by an accountant.

[12] Although it may be acceptable to obtain a loan from one bank and then borrow from another bank to repay the first loan (see Resp. Br. 55 & n.45), the banks concerned would have made an informed and deliberate decision to extend credit; check-kiting, by contrast, involves exploitation by the borrower of the check collection process without the lender's assent or knowledge. Check-kiting also is fundamentally different from the other practice respondent describes (Resp. Br. 55-56 & n.46), under which some banks or businesses take advantage of the "float" resulting from the collection process in order to retain the use of funds on deposit prior to the time checks drawn on the accounts are presented for payment. Because funds in fact are on deposit in the bank in such a case, the writer of the checks has a reasonable expectation that the checks will be paid when presented. In this case, by contrast, there is no evidence that petitioner believed that there would be sufficient funds in his accounts to cover the checks when presented, except in the form of other checks that were themselves supported by insufficient funds. See note 16, *infra*.

Gross, 416 F.2d 1205, 1212 (8th Cir. 1969) (Blackmun, J.), cert. denied, 397 U.S. 1013 (1970) ("[i]t is established that check kiting is within the reach of the fraud statutes").[13]

Respondent appears to suggest (Resp. Br. 56-57, 59-60 & nn. 49, 50) that this long-settled construction of 18 U.S.C. 1341 has been called into question by the decision in *Williams* v. *United States*. But even if respondent were correct—and there is no indication in *Williams* that he is[14]—this would hardly establish ineffective assistance of counsel at respondent's trial in 1980. Colston could not be found incompetent for not anticipating the holding in *Williams* or for believing an indictment for a check-kiting scheme under 18 U.S.C. 1014 (much less under 18 U.S.C. 1341) "to be as valid as the [four]

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[13] See also *United States* v. *Broxmeyer*, 192 F.2d 230, 232 (2d Cir. 1951); *United States* v. *Foshee*, 578 F.2d 629 (5th Cir. 1978); *United States* v. *Street*, 529 F.2d 226 (6th Cir. 1976); *United States* v. *Bessesen*, 445 F.2d 463, 469 (7th Cir.), cert. denied, 404 U.S. 984 (1971); *Federman* v. *United States*, 36 F.2d 441, 442 (7th Cir.), cert. denied, 281 U.S. 729 (1929); *United States* v. *Young*, 618 F.2d 1281, 1285 (8th Cir. 1980); *Williams* v. *United States*, 278 F.2d 535 (9th Cir. 1960); *United States* v. *Clark*, 456 F.2d 1375, 1377-1378 (10th Cir. 1972); *Deschenes* v. *United States*, 224 F.2d 688, 690 (10th Cir. 1955); *United States* v. *Scott*, 701 F.2d 1340, 1348 (11th Cir. 1983), quoting *United States* v. *Southers*, 583 F.2d 1302, 1308 n.8 (5th Cir. 1978).

[14] In *United States* v. *Frankel*, No. 83-1161 (3d Cir. Nov. 22, 1983), the court held that the rationale of *Williams* applied where the government charged a violation of 18 U.S.C. 1341 that was premised on the theory that the accused obtained money by a false or fraudulent representation in the form of a check supported by insufficient funds. Slip op. 4-5. The court made clear, however, that it was not holding that check-kiting was altogether beyond the reach of 18 U.S.C. 1341—*e.g.*, if the indictment charged a "scheme or artifice to defraud" that did not depend on the theory that an insufficient funds check is itself a false representation. Slip op. 6-10. The indictment in this case incorporated both theories (J.A. 10, 12-23). Accordingly, even assuming that the decision in *Frankel* is correct, it would not follow that respondent was wrongly charged.

dissenters in that case thought [it] to be." *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1334 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979), quoting *McMann* v. *Richardson*, 397 U.S. 759, 773 (1970) (first brackets in *Cooper* opinion).

Consistent with this view, we have argued in our amicus brief (at 26-30) in *Strickland* v. *Washington* that whether an attorney's performance fell materially below the range of competence demanded of defense counsel should be determined, as a threshold matter, by an objective standard. Under that standard, before a court would inquire into counsel's litigating strategy, the defendant would be required to show that the legal right or position he contends counsel should have asserted was clearly established under controlling statutory or case law at the time of counsel's actions. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 815-819 (1982). Such a rule would provide a remedy for any fundamental unfairness in the proceedings, and yet obviate the need in many cases for a broad-ranging and sensitive inquiry into counsel's handling of the defense, assure some consistency among decisions, respect the constitutionally required independence of defense counsel, and give effect to the presumption on which the adversary system is premised: "that [counsel] was conscious of his duties to his clients and that he sought conscientiously to discharge those duties." *Matthews* v. *United States*, 518 F.2d at 1246 (Stevens, J.). It is clear that respondent is not entitled to relief under this standard. At the time of his trial, controlling precedent in the Tenth Circuit established that check-kiting was unlawful under the mail fraud statute (see *United States* v. *Clark* and *Deschenes* v. *United States*, *supra*) as well as under the "false statement" statute involved in *Williams* (see *United States* v. *Stoddart*, 574 F.2d 1050, 1053 (10th Cir. 1978)).

c. Respondent also contends that Colston was incompetent because he did not present what respondent now terms a "very substantial defense" (Resp. Br. 58); that "there was no fraud and no intent to defraud" (Resp.

Br. 56) because the Norman bank ultimately was not damaged by the check-kiting scheme. He even goes so far as to claim that "[i]f there was a swindler, it was not respondent—it was the Norman Bank" (Resp. Br. 57). See Resp. Br. 56-58, 60. This assertion is frivolous.[15]

Upon discovery by officials of the Norman bank that respondent's activities had resulted in an imbalance of almost $1 million, they persuaded the Tampa bank to freeze the approximately $500,000 it had in Skyproof's account (Tr. 169-170). Respondent promised to reimburse the Norman bank for the remaining $484,000 when confronted by bank officials in October 1975, but he never attempted to make good on that promise (Tr. 172, 180-181). As a result, there was a substantial question for several weeks whether regulatory authorities would close the bank (Tr. 174-175, 192).

In November 1975, without respondent's knowledge, Cummings executed a note to the Norman bank for the amount of the $484,000 overdraft. This note was secured by Skyproof's assets, including the Paris Processing bottling plant. Cummings testified that when respondent learned of this, he was "furious" and told Cummings that she had signed away their "legal ace in the hole" in the event of a lawsuit (Tr. 507-509). The bank examiners required the Norman bank to charge off all but $170,000 of the amount of the note because there was no realistic prospect the remainder would be recovered (Tr. 179-180, 191-192, 437). When respondent then began to siphon off the bottling plant's income, the bank took control of the

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[15] Equally frivolous is respondent's suggestion that Colston was incompetent because he did not argue that the net overdraft was only 4.5% of the total amount of deposits in the Norman and Tampa banks during the six-month period and therefore might have been caused by a "bookkeeping error" (Resp. Br. 57). The net overdraft respondent seeks to minimize totaled $484,000, a figure that could not plausibly be attributed to a "bookkeeping error" by a small business like Skyproof. The fact that it constituted "only" 4.5% of the total deposits is due to the sheer magnitude of respondent's check-kiting scheme, which involved checks bearing a face value of almost $10,000,000 (see Resp. Br. 11).

plant in December 1975. Ultimately, the bank foreclosed on the mortgage, the bottling plant was sold at a sheriff's sale to the bank (the only bidder) for $504,000, and the plant immediately was purchased by two of the bank's directors for a $504,000 promissory note (Tr. 177-179, 207-208, 211-213, 217-218, 440-441). The bank's attorney testified at trial that the bank had not received any payments on this note and that the "prospects of it seeing any cash in the full amount of what it's been out are very slim" (Tr. 218).

Thus, there is no basis in the record for the contention that the Norman bank ultimately recovered the amount of the overdraft, except in the form of the promissory note from its directors. But even if everyone (including the directors who sought to bail out the bank) ultimately had been reimbursed by respondent, this would not negate the existence of a violation of 18 U.S.C. 1341. The mail fraud statute requires only the existence of a scheme to defraud (*Pereira* v. *United States*, 347 U.S. at 8); it does not require that the scheme be successful. See, *e.g.*, *United States* v. *Goss*, 650 F.2d 1336, 1342 (5th Cir. 1981); *United States* v. *Gross*, 416 F.2d at 1209; *Williams* v. *United States*, 278 F.2d 535 (9th Cir. 1960). In some circumstances, reimbursement may constitute evidence of an absence of fraudulent intent at the time of the overdrafts. *United States* v. *Foshee*, 578 F.2d at 633-634. But there was no evidence here that the bank received full payment from Skyproof, much less that respondent voluntarily directed reimbursement in a manner that could suggest good faith. Compare *United States* v. *Constant*, 501 F.2d 1284, 1289 (5th Cir. 1974); cf. *United States* v. *Bailey*, 444 U.S. 394, 411-417 (1980).[16] Accordingly, Colston

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[16] Respondent also errs in contending (Resp. Br. 60 n.50) that a violation of 18 U.S.C. 1341 requires a showing of an intent permanently to deprive the bank of funds. It is sufficient, in the Tenth Circuit as elsewhere, that the defendant knew that there would be insufficient funds in the account to pay the checks when presented in the normal course of business, other than by the deposit in rapid

cannot be thought to have been incompetent for attempting to place the entire responsibility for Skyproof and its checking accounts on Cummings, rather than conceding that respondent was responsible for both but maintaining that he lacked fraudulent intent, as respondent now argues. Compare New Trial Motion at 11-21. In this respect, as in the others discussed above, respondent's speculative assertions and second-guessing of trial counsel's strategy and conduct do not, on the present record, raise even a colorable claim of ineffective assistance of counsel.

For the foregoing reasons and the additional reasons stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.[17]

REX E. LEE
Solicitor General

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succession of other checks that the defendant knew or had reason to know were not supported by sufficient funds. See, *e.g.*, *United States* v. *Clark*, 456 F.2d at 1378; *Deschenes* v. *United States*, 224 F.2d at 690; *United States* v. *Bessesen*, 445 F.2d at 469; *Williams* v. *United States*, 278 F.2d at 537-538; *Reasonable Expectation of Payment as Affecting Offense under "Worthless Check" Statutes*, Annot., 9 A.L.R. 3d 719, 721, 725 (1966).

[17] Because the ineffective assistance of counsel issue was not addressed by the district court and was raised for the first time on appeal, the case should not, contrary to respondent's suggestion (Resp. Br. 61-65), be remanded to the court of appeals for consideration of respondent's particularized attack on Colston's actual performance. Those claims, to the extent they have any merit, can be addressed in a proceeding under 28 U.S.C. 2255. See Gov't Br. 40-41 n.30.

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